

PROPOSED STUDY OUTLINE FOR SJR 32

A Study of Medical Liability Insurance Issues

Prepared for
The SJR 32 Subcommittee on Medical Liability Insurance
by David D. Bohyer, Research Director

September 2003

Published By



***Legislative
Services
Division***

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INTRODUCTION

As the 58th Legislature was completing its business during the 2003 Regular Session, SJR 32 was crafted and introduced to address a problem that was perceived to be emerging in Montana: rising premium costs and declining availability of medical malpractice liability insurance (MMLI). Testimony revealed that several hospitals had experienced 10-fold increases in MMLI premiums in the past 2 or 3 years and others that incurred substantial increases or were anticipating them.

SJR 32 passed both houses easily and was ranked first among 13 requests for interim studies. Ultimately, the Legislative Council created the SJR 32 Subcommittee on Medical Liability Insurance (Subcommittee). The Subcommittee is composed of four members of the Legislative Council and four members named by the Council chair, Rep. Kim Gillan. Under that direction, Rep. Gillan appointed Rep. George Golie as chairman and the following as members: Senators John Cobb, Brent Cromley, Duane Grimes and Debbie Shea and Representatives Roy Brown, Kathleen Galvin-Halcro and Don Roberts.

The remainder of this report lays out a proposed study design for SJR 32, including a work plan and Committee meeting schedule. Once reviewed, revised as necessary, and adopted by the Committee, the study design will be the blueprint that the staff, the stakeholders, and the Committee members will follow.

STUDY ISSUES

The reasons for SJR 32, as contained in the "whereas" clauses, include alarm at increasing MMLI premiums, threats to the well-being of the state if the recruitment or retention of health care providers should occur, a legislative finding that access to MMLI has declined due to a declining number of insurers offering MMLI in Montana, a direct and significant relationship between rising MMLI premiums and the cost of health care in Montana, a possible negative relationship between increasing MMLI premiums and the provision of certain medical services in Montana, and a belief that stabilizing MMLI premiums will contribute toward cost containment for health care for Montana citizens.

DIRECTION FROM THE LEGISLATURE

General directions to the Subcommittee for conducting the study are contained in the "resolved" clauses of SJR 32. Those directions include:

- reviewing measures adopted by other states to address liability insurance problems;
- identifying strategies for increasing availability of affordable liability coverage;
- identifying factors affecting the cost of liability insurance;
- examining strategies for resolving liability claims outside of the court system; and
- developing a specific list of options for consideration by the 59th Legislature.

Additionally, the Legislature directed that information and assistance be sought from representatives of the insurance industry related to professional liability insurance for health care facilities and health care providers associated with health care facilities, medical services facilities and providers, associations of trial and defense attorneys, and other interested persons.

PROPOSED STUDY DESIGN

The SJR 32 study can be approached in four phases that are, simultaneously, distinct and overlapping. As envisioned, the four study phases are: (1) building a foundation of facts and evidence regarding MMLI; (2) identifying and analyzing specific factors believed by the Subcommittee to be influencing MMLI premium increases and availability; (3) developing, through Subcommittee consensus, findings and conclusions about the causes of MMLI premium increases and availability in Montana and what effect MMLI premiums and availability may have with respect to health care and the welfare of Montanans; (4) identifying, through Subcommittee consensus, legislative options for addressing the causes of MMLI premium increases and availability in Montana.

Phase 1: Building a foundation

Compiling facts and evidence about MMLI will be ongoing throughout the study, but will largely be "front loaded". This phase of the proposed study design includes the following elements:

- a literature review, conducted largely by staff and supplemented through research conducted independently by Subcommittee members. The staff will develop and present a summary of the literature, plus some Montana-specific information on MMLI issues.

- a legal history of medical liability in Montana. Staff will begin the historical review at the adoption of the Montana Constitution in 1972 and provide an overview of constitutional and statutory requirements, restrictions, authority, etc. The implications of relevant case law will be also be examined and interpreted.
- the experience of MMLI stakeholders, i.e., the representatives or groups identified in SJR 32, plus others considered by the Subcommittee or staff to be directly impacted by MMLI.

Phase 2: Narrowing the focus

The scope of the SJR 32 study request is fairly broad and amorphous. The proposed study plan provides an opportunity for the Subcommittee to more clearly identify its own priorities within the guidelines provided in SJR 32. Upon clarifying its priorities, the Subcommittee members will need to articulate their individual hypotheses about the ways in which various factors affect or cause changes in MMLI premiums or availability. This phase of the study will include:

- an issues and options decision tool, prepared by staff, that the Subcommittee can use to clarify priorities and narrow the focus of the study. The objective of this exercise is to establish in relatively clear terms hypotheses about the causes of rising MMLI premiums in Montana and the concomitant declining availability of MMLI in Montana.
- compiling or analyzing additional information, including information identified as necessary or useful to the Subcommittee's future discussions or goals. The information may be provided by the "stakeholders" or the Subcommittee's staff, or it may involve provoking more dynamic interaction between the Subcommittee and others, such as a panel of experts or through topic-specific seminars conducted by experts.

Phase 3: Findings and conclusions

The hypotheses developed by the Subcommittee in Phase 2 will provide the basis for continuing research and analysis. Subsequently, the accumulation of information and understanding by the Subcommittee members will promote the development of findings from which the Subcommittee can draw conclusions.

This phase of the study will include:

- compiling, analyzing, and reporting information directly related to the hypotheses developed previously by the Subcommittee. This type of information may be available from current resources or it may have to be developed by staff, stakeholders, or Subcommittee members. The Subcommittee will establish formal findings by examining and discussing

the information. (Decision tools can be developed by staff to assist in this exercise.)

- drawing conclusions from the findings adopted previously. The conclusions drawn through this exercise can form the basis for options, including proposed legislation, that may be developed in Phase 4.

Phase 4: Legislative options

The findings and conclusions developed in Phase 3 may lead the Subcommittee to develop options for legislative consideration. In fact, that is the guidance provided in SJR 32. The options should be carefully crafted to address the legislatively-controllable causes of MMLI premium increases and availability in Montana.

For example, the Subcommittee could propose that the 59th Legislature adopt legislation regulating the ability of insurers to increase MMLI premiums or adopt additional tort reforms believed to mitigate litigation or its perceived effects. Either option would fall within the guidance provided in SJR 32.

In contrast, an option recommending that legislation be adopted to require the Montana Department of Public Health and Human Services to enter into a purchasing pool for prescription drugs would not meet the objective outlined in SJR 32.

COMMITTEE WORK AND MEETING SCHEDULE

SJR 32 requires the study to be completed prior to September 15, 2004. Additionally, the Legislative Council had directed that the Subcommittee hold its meetings in conjunction with scheduled meetings of the Council. Based on those two factors, the proposed meeting dates for the Subcommittee are:

- Monday, September 22, 2003
- Thursday, November 20, 2003 (Tentative--Council meets Friday, 11/21.)
- Tuesday, January 13, 2004 (Tentative--Council meets Monday, 1/12.)
- Thursday, March 25, 2004 (Tentative--Council meets Friday, 3/26.)
- Tuesday, June 22, 2004 (Tentative--Council meets Monday, 6/21.)

Following are preliminary outlines of tentative agendas for each of the proposed meetings.

Monday, September 22, 2003

- Briefing on MMLI pricing and availability.
- Briefings on MMLI crisis as perceived by stakeholders.
- Subcommittee discussion to focus future research, analysis, testimony, and committee activities.
- Adopt study plan and meeting schedule.

- ▶ Administrative activities.

Thursday, November 20, 2003 (tentative)

- ▶ Briefing on the legal history of medical liability in Montana.
- ▶ Briefing on the purpose, authority, and effect of the Montana Medical Legal Panel.
- ▶ Briefing on measures adopted by other states to address liability insurance problems.
- ▶ Subcommittee work session to establish hypotheses about the causes of rising MMLI premiums in Montana and the concomitant declining availability of MMLI in Montana.
- ▶ Direct additional research and analysis.

Tuesday, January 13, 2004 (tentative)

- ▶ Briefing on information related to hypotheses about MMLI premiums and availability.
- ▶ Develop preliminary findings and conclusions.
- ▶ Direct additional research and analysis.

Thursday, March 25, 2004 (tentative)

- ▶ Briefing on additional information related to hypotheses about MMLI premiums and availability.
- ▶ Refinement of findings and conclusions previously developed.
- ▶ Develop additional or final findings and conclusions.
- ▶ Contingently or finally adopt findings and conclusions as practical.
- ▶ Identify potential options to address MMLI problems.
- ▶ Direct additional research and analysis.

Tuesday, June 22, 2004 (tentative)

- ▶ Briefing on additional information, research, analysis.
- ▶ Adopt final findings and conclusions.
- ▶ Discuss options previously identified.
- ▶ Propose and discuss additional options.
- ▶ Contingently or finally recommend options for legislative consideration.
- ▶ Review, revise, and adopt proposed outline of Subcommittee report to the 59th Legislature.

If the Subcommittee is unable to conclude its work at the June 22, 2004 meeting, completion and closure might be accomplished through a conference call or an additional meeting prior to September 15, 2004.